IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY, a corporation,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

tion for Review of an Order of Federal Power Commission.

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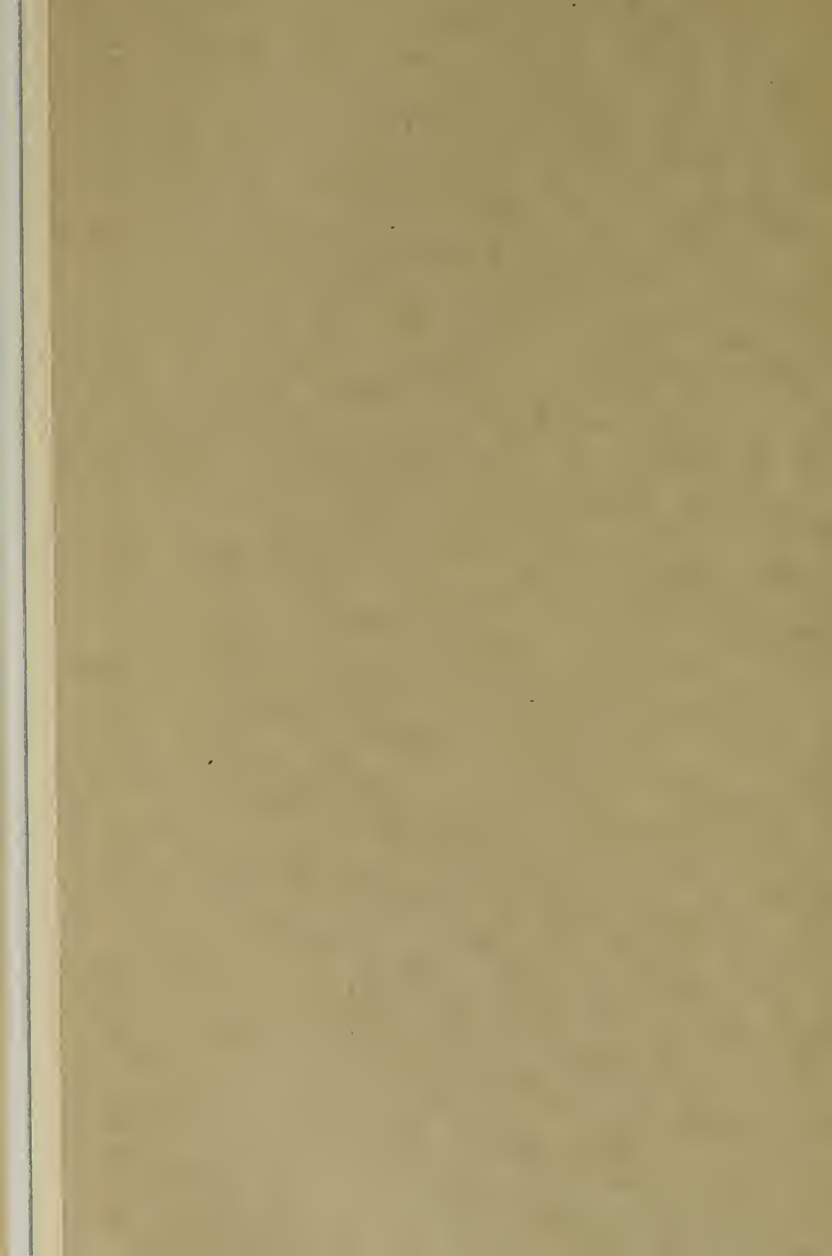

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NIA ELECTRIC POWER COMPANY, a corporation,

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vs.

POWER COMMISSION,

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PETITIONER'S REPLY BRIEF.

Respondent (FPC) and Intervenors (Navy and County), in their briefs, follow substantially the e of argument, we will reply to all of them Some of our arguments they fail to answer, cite no decision which sustains their conten- 'hey complain that we rely upon the literal lan- the statute and, to avoid its effect, they call it of draftsmanship."

ndency of FPC to ignore Part I of the Act is in their brief, for, though Petitioner's brief the natural order in discussing Part I of the

I.

This Case Can Be Decided and Should Be Under Part I of the Act, Which Clearly FPC Jurisdiction.

Both by contractual provisions of Petitioner's (Pet. Op. Br., App. p. 6) and by the statutory p of Sections 19 and 20 of the Act, the regul Petitioner's rates involved herein is delegated State Commission or Commissions. If no interst merce is involved, the jurisdiction of Californ mission is complete under Section 19. If interst merce is involved, the jurisdiction lies in the t Commissions under Section 20. In either event, FPC does not have jurisdiction, and will not ha it be found at some future time that the State sions are unable to agree. There is no occasion recourse to Part II of the Act.

> *Safe Harbor W. P. Corp. v. FPC,* 120 F (C. A. 3) decided in 1941 (First Safe

Following that decision, the distinction betw rights and obligations of licensees under Part other interstate utilities under Part II of the recognized in two other circuits.

> *Alabama Power Co. v. FPC,* 128 F. 2d cit. syl. 18, 19, p. 293) (D. C. Cir.), 317 U. S. 652, 63 Sup. Ct. 48;

ontentions of our opponents to escape the plain
is of the Act and the effect of those decisions
ollows:

is contended (FPC Br. p. 12) that *Safe Harbor*
'orp. v. FPC, 179 F. 2d 179 (C. A. 3) decided
(Second Safe Harbor) and *Pennsylvania W. & P.*
FPC, ... F. 2d, ... (D. C. Cir.) decided
1951 (certiorari granted), have in some way
d the application of Sections 19 and 20 of the
also weakened the decision in *First Safe Harbor.*

rst Safe Harbor, it was held that FPC did not
isdiction over rates for energy sold at wholesale
tate commerce by a licensee, there being no show-
States' disagreement. The energy was generated
sylvania and transmitted and sold for resale in
d. The crucial fact not stressed by our oppo-
that, after *First Safe Harbor* was decided in
very important change in conditions occurred.
s a letter, dated August 30, 1944, sent by Public
Commission of Maryland to FPC requesting it
jurisdiction in that same matter of rates charged
Harbor W. P. Corp. for energy generated in
vania and sold for resale in Maryland. That
as set forth in full and relied upon as showing
States were unable to agree in *Second Safe*
decided in 1949, and that decision was followed
sylvania W. & P. Co., decided in 1951. There-
cording to the express language of Section 20
Act, FPC had jurisdiction.

finding or evidence that the California and Neva
missions are unable to agree. In the Navy's
is twice incorrectly stated (pp. 18, 19) that the C
and Nevada Commissions have been unable to ag
in both of our opponents' briefs, it is intimated t
duty rests on Petitioner to show that the Sta
missions have agreed or are able to agree. Th
endeavor to turn Section 20 around. That Sect
not require any such showing. It does require, a
out in our Opening Brief (pp. 46-48), a show
they are unable to agree, in order to support FP
diction. There is no such finding or evidence.

The matter is so simple that much ingenuity
sary to make it appear complicated. The Com
of the delivering state (California) regulates
charged for sales of energy for use in the receiv
(Nevada). If there is no protest from the latt
is no failure to agree. Nevada Commission h
had reason to protest, for the California Com
fixes exactly the same rates for sales to Minera
purchasers at Petitioner's Mill Creek Plant in C
as it does for other consumers of like quantities c
sold to other customers in California. It is a n
national note that California Commission is on
most rigorous Commissions in the country in th
of keeping utility rates at a minimum.

2. It is contended (FPC Br. pp. 37-40, 44-
Nevada does not have a Commission answering

d irrelevant evidence to dispute the plain language
on 16 of the Mineral County Power System
Act (Pet. Op. Br., App. p. 10). The first piece
evidence was Exhibit 6, being an opinion of the
General of Nevada to the effect that the Nevada
ion did not have jurisdiction over the rates of
County Power Dictrict No. 1, which was an
ifferent kind of entity organized under a different

ext piece of evidence was a letter from the Sec-
the Nevada Commission, stating that the Nevada
ion did not have jurisdiction over Mineral County
ystem, because the latter was a quasimunicipal
on, which was not the fact. This was lay opinion
e the clear provisions of the Nevada law, and was
by the Hearing Examiner [R. 244-247]. But,
hearing [R. 110], FPC reversed the Examiner
rporated this letter in the record.

the hearing herein, Nevada Commission requested
on of the Attorney General of Nevada as to its
on over rates of Mineral County Power System,
Attorney General rendered the opinion [R. 129]
id have jurisdiction just as provided in Section
e Mineral County Act, and further explained the
bility of his earlier opinion, Exhibit 6.

PC refused to receive this when tendered with our

To this plain error, FPC interposes two respon

First, it says that technical rules of evidence
be applied and no informality in taking testim
invalidate an order. Bearing in mind that this
crucial point on which the whole case turned s
Part I of the Act went, it is rather amazing t
that to ignore the Nevada Statute, to reject th
of the Attorney General, and to receive instead a
relating to a different matter and lay opinion
up by hearsay testimony of a stranger is merely
infraction of the rules of evidence or an inform

Secondly, while not claiming that the presen
the Attorney General's opinion of April 24, 1
too late, FPC merely says that it was late. As
of fact, a copy of that opinion was presented to
an appendix to our Reply Brief filed with FPC
1950, only three months after the hearing and tw
after the opinion was written and one month
had knowledge of it. On September 5, 1950, the
Examiner filed his initial decision [R. 13] s
the Petitioner on every point and recommen
missal of the case. The Attorney General's op
been given consideration and Petitioner had won
there was no occasion for Petitioner to do anyt
ther. FPC then held the case under advisement
months from September 5, 1950, to April 13, 19

, the Application for Rehearing filed May 4,
. 113] was accompanied by Motion to Reopen
rd and receive the neglected Attorney General's
[R. 126]. FPC could have admitted the Attor-
ral's Opinion as easily as it admitted other and
ative evidence which had been excluded by the
r.

FPC, confronted with the clear fact and law that
Commission does have jurisdiction to regulate the
Mineral County, makes what we have properly
e "bizarre" contention that the Nevada Com-
s not, as provided in Section 20, "a commission
authority to enforce the requirements of this sec-
in such state," unless it has power to enforce
rements of said section *without* such state. It
hat Congress could have had in mind only the
e of state regulatory body empowered to regulate
hin its own state. There was no concept what-
State Commission which would have authority
te rates outside its own state.

ites the statutes of Maryland and Pennsylvania
ve the respective Commissions authority to make
estigations, hold joint hearings, and issue joint
rrent orders with any other like Commission.
e statutes were enacted in 1927 and 1937, re-
, long after 1920 when the language of Section

any provision in State law authorizing the C
Commission to participate in a concurrent hear
the federal commission, the Order to Show Caus
[R. 7-8] set such a hearing and the same was d
FPC Rules (Sec. 1.37) made pursuant to Sec
of the Act provide, not only for concurrent hear
for joint hearings with State Commissions, irr
of any state statute expressly authorizing the sa
annual reports of FPC for many years back sh
such hearings and other forms of cooperation
frequent occurrence under the Act, without an
sponding state legislation. Obviously State Com
have as much power to cooperate with each
they do with FPC.

FPC makes the obviously unsound contention
(and attributes it to us) that, if Mineral Cou
overcharged for energy, all the Nevada Commiss
do would be to refuse to allow Mineral County
rates high enough to pay the excessive charge.
counsel will just read Section 20, they will find
the Nevada Commission need do would be to
its inability to agree upon the higher rate and th
matically invoke jurisdiction of FPC.

Equally extreme is the misconstruction placed
(Br. p. 17) upon Sections 6147, 6148 and 6149,
Compiled Laws, as in some way incapacitating the
Commission in acting under Section 20. These

ꞵons, not to engage in public service have surplus
power available for sale to a public utility.
ıs fear that, by such sales, the private owners
:ome public utilities. This statute was designed
·age such sales by assuring the seller that he
ıt be caught in the regulatory machinery. It
ıly to sellers who are not public utilities and pro-
t they shall not, by such sales, become public
This interpretation of the Act is demonstrated
nal sentence—a very unusual provision—which
he faith of the State of Nevada against any
, amendment or repeal of the act during the
of any such contract. To apply that act to a
o is already a public utility would reduce the
an absurdity.

ıite evident that FPC does not like Sections 19
ıt prefers Part II of the Act and makes only a
ecognition toward Section 20, always linking it
ıly with Sections 205 and 206.

ions 19 and 20 mean anything at all, they mean
State Commission or Commissions have exclu-
ꞵdiction so long as such Commissions exist and
sagree. The device of ignoring this State juris-
y speaking broadly of FPC jurisdiction under
20, 205 and 206, jointly, is misleading. Ob-
ꞵoth State Commissions and FPC cannot at the

II.

Petitioner's Rates Involved Herein Are Not to Regulations by FPC Under Part II, 205 and 206.

Whether or not the energy delivered by Peti the Navy and Mineral County is generically o tutionally in interstate commerce is not an issu Some interstate energy is expressly excluded by from FPC jurisdiction and left for regulatior States. That is constitutionally permissible unc cited in our Opening Brief (pp. 34, 39, 40) questioned by Respondent or Intervenors.

Admittedly, regulation of one very large class state sales is delegated to State authority, *v* directly to the ultimate consumer, and not fc Hence, the effort of FPC and Navy in this case that Navy resells some of the energy to employe on the Ammunition Depot Reservation. Such colorable and is really a part of the operatio Depot. The occupants live under military disci are subject to summary ejectment by the Con Officer [Ex. 23].

This exemption of sales in interstate commer dividual customers for consumption is worth re It shows that Congress did not think it nece desirable to provide for federal regulation in su It provided for federal regulation only where el ergy (or gas) was sold for resale to the gener It was trying to protect the general consumin typically a city or community. The record he

ates there are arbitrarily fixed without reference
of power purchased from Petitioner. All that
s to do is to fix house rent, electricity, water,
, garbage disposal and other services at a price
ggregate which will attract employees for work
her hazardous place. It is immaterial how the
's expense is distributed among the accommoda-
ervices furnished. The whole is merely a matter
al accounting of the Navy. Of course, this is
y that Navy should not have a fair rate; it is
ay that this is not an example of resale regulation
ould carry out any policy of Congress since
gulation of the rate at Mill Creek would have no
le relation to the rate charged the ultimate con-

er class of business which could constitutionally
ted as interstate commerce, but which is excluded
jurisdiction of FPC is transmission of energy
e State to another by the government, a State,
l corporation, or other political subdivision, agency
mentality. Section 201(f) states that "No pro-
this Part (II) shall apply to" any of the above
FPC's argument that this applies to those
but not to their activities is too captious to recom-
elf. Hence, the definition of interstate commerce
c energy in Section 201(c) does not apply to
governmental agencies or activities. Navy and
County simply buy energy at the Petitioner's Mill
lant in California. What is done with it by
blic agencies is outside the statute and cannot be

vantageous rate than the rates fixed by the C
Commission. What assurance they have of tha
not know, but it certainly cannot always be tru
hardly possible that their interest is purely acade
if it were supposed that FPC would fix higher r
viously, the interest of the intervenors would wa
did not produce a complete reversal of position.

As we have said, FPC jurisdiction attaches un
II only to rates for energy sold at wholesale
state commerce and wholesale is defined in Sectio
as "a sale of electric energy to any person for
The definitions in Section 3, which apply throug
Act, define a "person" so as not to include Navy or
County. Our opponents admit that this is th
provision of the Act, and their only escape is to
"quirk of draftsmanship." Some provisions they
be interpreted very literally; others adverse to th
want ignored or cast aside as clerical misprisions

The contention of FPC is directly contrary to
tion they took respecting the word "person" i
States ex rel. Chapman v. Fed. Power Com., 1
796 (C. A. 4). Their brief in that case is q
pages 59-61 of our Opening Brief. This is
denied.

FPC argues (p. 23) that our contention wou
give effect to Section 306 of the Act allowing

ord "person" was deemed not to include govern-
encies. Section 306 provides:

ny person, state, municipality, or State Com-
on complaining of anything done or omitted to
ne by any licensee or public utility" etc. etc.

monstrates the understanding of Congress that
word "person" alone would not have included
unicipality, or State Commission," and it was
to mention them expressly.

y decision cited holding that Section 3(3)(4)(7)
on 201(d) do not mean what they say is the
of FPC in *Otter Tail Power Company.* That
he present argument go on the assumption that,
municipalities for resale are not brought under
sdiction, they must go unregulated. That is not
ans merely that they are left to the State Com-
In the present case, they have been so regu-
two moderate and reasonable increases to meet
ised costs of service (measured in present day
ave been granted in the past three or four years.
the last order was sought by Navy and Mineral
the Supreme Court of California and denied.
31, Feb. 18, 1952.) Under California law, such
deemed a decision on the merits and tantamount
tion of the Commission's decision.

ons made by FPC about "filling the gap" left
oro are misleading. There was no gap created
licensees were concerned. As to other interstate
the gap was filled by conferring part of the

So, on two counts, sales to Navy and Miner
are exempt under Part II, first, because they a
interstate commerce as defined in the Act, and,
because they are not sales to a "person" as
the Act.

Some Jurisdiction Under Part II.

It is hardly fair to say, as FPC does (p.
Petitioner's position is taken as a "tactical m
cause it admits some FPC jurisdiction under
The inference seems to be indulged, contrary to
lished principles, that, if Petitioner is subject to
vision of Part II, it is subject to all and, hence
are all subject to FPC regulation. This is ve
not so and the argument now presented by F
designed to confuse.

The mere fact that a Company is a public
gaged in interstate transmission in electric en
not subject all of its rates to FPC regulation.
FPC would succeed to all of the functions of
Commissions so far as interstate utilities are
Each particular rate has to be examined to
provided in Sections 205 and 206, the transm
sale is subject to FPC jurisdiction and, for tha
we look to Section 201.

That is exactly what FPC held in *In the*
Wisconsin-Michigan Power Co., Docket E-626
1951, quoted at page 36 of our Opening Brief

Accordingly, it is not only logical but necess
utility engaged in interstate transmission to a

ses cited (Resp. Br. p. 12) being *Second Safe* *nd Pennsylvania W. & P. Co.* do not indicate ary. Respondent's discussion, itself, discloses of those cases was decided on the principle that s were unable to agree, thus bringing in FPC on under Section 20. Therefore, the rest of sion as to jurisdiction under Part II is unneces- l.

DISTINGUISHABLE" 25%.

aims that, of the energy delivered by Petitioner approximately 25% is "resold" to employees government quarters in the Naval Reservation herefore, subject to FPC jurisdiction. It must ed that the remaining 75%, at least, is not sub- PC jurisdiction. Next, FPC says that the two led and therefore FPC has jurisdiction over the In our Opening Brief, we asked in effect why e "tail wag the dog."

answer (p. 27) is based on five cited cases.

Central P. & L. Co., Connecticut L. & P. Co. *ford E. L. Co.* are not in point, for they did not ates for mingled energy or rates at all. The tion there presented was whether or not those s came under the accounting provisions of Part e Act. It was held that they did, because they aged in interstate transmission of energy, not- ing that the amount of energy transmitted was ll. Obviously, if these Companies were required e FPC system of accounts, they would have to

to keep one set for intrastate operations and an
interstate operations. That is quite a different
from the mere delivery of so many kilowatt
energy at a schedule rate which can be very easil
or apportioned.

Kentucky Natural Gas is not in point, for th
states that the entire operations of that Comp
in interstate commerce.

That leaves only *Pennsylvania W. & P. C*
ported). Certiorari has been granted in that
ruary 4, 1952, so that it cannot be deemed a final
If it were, however, it does not present facts
to the instant case. There the local and inters
plies of energy were fed into a common system
from which local and interstate customers wer
In such a situation, power flows here or there
a demand is placed on the lines, much the same
flows out of a reservoir wherever resistance is
The respective flows of intrastate energy (hy
interstate energy (steam) fluctuated continually
hour, day to day, and even year to year. Eac
state and interstate, supported the other. T
simply a big "pool" of electric force fed cons
both sources in constantly varying quantities.

That is entirely different from the present ca
each month a definitely measured number of

Navy) show these quantities accurately separated
th. We have used 25% and 75% merely for
argument. The respective amounts can be
to decimals [see Finding 6, R. 105]. No repe-
nmission action would be required. The federal
commission would simply fix the respective
rest being mere mechanical and clerical com-

is no "inextricable" mixture in such operations.
Power Co. v. Fed. Power Com., 189 F. 2d 665
Cir.), we have an instance where FPC imposed
dition in a license for a transmission line that
ee connect said line with the government's line
smit government power, along with licensee's
While that condition was stricken out by the
e question is suggested: If the arrangement had
roved, would the next step have been for the
nt to claim that, since the licensee's power and
rnment's power were inextricably intermixed on
mission line, therefore, it all belonged to the
nt? Certainly not, for the mixture and separa-
ower in that way is a common every day job for
engineers. The case cited by Respondent (*City
ngeles v. The Nevada-California Electric Corp.,*
C. 104, 32 P. U. R. N. S. 193) was an ex-
that operation. There is no logical, reasonable
lausible support for that part of the Order herein

Acquiescence or Estoppel.

FPC argues (pp. 3-4) that Petitioner acqu
FPC regulation under Part II by filing som
Mineral County contracts as schedules. If th
jurisdiction as to Mineral County service, P
failure to file the Navy contract equally dispr
jurisdiction. As a matter of law, neither fact
anything, for jurisdiction cannot be conferred
acquiescence, estoppel, waiver or agreement.
solely from the statute.

FPC cites *City of Los Angeles v. The Ne*
fornia Electric Corp (supra). That case does
port any claim of acquiescence, for it involved
energy at all and, hence, in no event could co
Sections 19 or 20, which apply only to sales.
in that case were that this Petitioner, under an a
transmitted or carried power for the City of Lo
over this Petitioner's liner from Hoover or Bo
in Nevada to the City of Los Angeles for a cha
power was part of that allocated to the City by th
ment at the Dam, was purchased by the City fro
ernment and merely transmitted by the Compa
City. This transmission was interstate, and
subject to FPC jurisdiction under Part II of the
being no provision in Part I applicable there
case is of no significance here.

n to issue a license under Part I of the Act
ctric line which was not a "primary line," that
transmission line leading from a licensed project
ginning with the organization of FPC in 1920
some 20 years until March 20, 1941, FPC
issued such licenses for minor lines of all kinds,
of them, and many of such licenses are still
g. FPC jurisdiction to do so was formally
by FPC and by the Secretaries of the Interior,
re, and War, who had previously issued per-
rights of way under the Right of Way Acts
ur Opening Brief. Indeed, the three Secretaries
denied their own jurisdiction and refused to
further permits, the applicants being referred
or licenses under Part I of the Act.

arch 20, 1941, FPC suddenly issued Release
ying its jurisdiction to issue such licenses and
since refused to do so, referring applicants to
aries, who have resumed their activities, so long
d, under the old Right of Way Acts. Pacific
Co. sought such a license from FPC and, on
petitioned for review in the Court of Appeals
istrict of Columbia.

ourt affirmed FPC's decision and held, contrary
stration construction, interdepartmental agree-
20 years of general understanding, that FPC
ave jurisdiction to issue such licenses for "non

Conclusion.

There is no regulatory gap to be filled in
Nothing has escaped or will escape proper and
regulation exactly as contemplated by Congre
case seems to have been begun by FPC throug
understanding of Nevada law and the Interv
apparently merely assuming that federal regul
afford them lower rates.

The Order should be reversed.

Respectfully submitted,

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